

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	

**REPLY COMMENTS OF  
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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## Summary

The comments filed in response to the Forbearance Reversal Petition confirm what is already clear from the Petition and the overwhelming weight of the evidence in the record for this docket: there is not enough competition in the special access market for the Commission to continue forbearing from regulation of the ILECs' non-TDM special access services.

The information proffered by the ILECs in their comments does not undermine or rebut the evidence that competition is lacking, for several reasons.

First, while the ILECs offer various data regarding putative competition for packet-based last mile access services, the information consists of subjective and non-empirical estimates from investment analysts, patently self-serving marketing materials from CLECs, or relates to services other than those at issue, none of which can provide the basis for a reasonable Commission decision.

Second, even in those few instances where the ILECs' data relate to the relevant market, the information provided is defective in two respects: (1) the number of competitor-owned last mile connections are presented without data regarding the size of the market as a whole; and (2) the ILECs fail to distinguish between CLEC-owned last mile facilities and last mile connections included by competitors as components of their interexchange service offerings (and provided most frequently over leased ILEC connections). Without facilities-based competition, the special access market simply is not sufficiently competitive for forbearance. The fallacy inherent in relying on resale competition is epitomized by the ILECs' touting of Ethernet Over Copper ("EoC") as a viable last mile competitor, while aggressively lobbying for the deregulation of copper

loops. Of course, once such loops are no longer available at TELRIC prices, EoC competition will vanish.

Third, while Verizon makes much of the fact that it has entered into thousands of contracts with its competitors, it provides no information regarding the nature and number of services, circuits, or customers covered by these contracts. Without this information, Verizon's statement has no probative value. Similarly, the Commission should reject Verizon's implication that, because unaffiliated carriers opted to purchase services from Verizon and negotiated their terms and conditions, the market for such services must be competitive. An equally likely explanation is that Verizon's competitors had no other choice of provider.

Finally, perhaps the most powerful evidence in support of the Forbearance Reversal Petition is the comprehensive record that already exists in this long-standing docket. The ILECs have portrayed the public network's natural evolution to IP as a transformational event that magically eliminates the entry barriers and other brute economic realities that impede competition in the special access marketplace. Now that IP is a familiar, almost commonplace technology for services like special access, the Commission should ignore the ILECs' IP pixie dust and reverse its misguided forbearance decisions.

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THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (“Ad Hoc”) hereby responds to the comments filed in response to the Public Notice in the docket captioned above.<sup>1</sup> As described in greater detail below, the comments confirm what has already been demonstrated by the extensive record in this long-standing proceeding: there is insufficient competition in the special access market to continue the regulatory forbearance granted to the incumbent local exchange carriers (“ILECs”).

**I. INTRODUCTION**

In its Public Notice, the Commission sought comment on a petition filed by a broad cross section of the broadband ecosystem – including end users, competitive

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment On Petition To Reverse Forbearance From Dominant Carrier Regulations Of Incumbent LECS’ Non-TDM-Based Special Access Services*, 28 FCC Rcd 1280 (2013).

local exchange carriers (“CLECs”), nation-wide interexchange carriers, wireless companies, and the leading trade association for computer companies, equipment manufacturers, software developers, service providers, re-sellers, and systems integrators – to reverse the forbearance from dominant carrier regulation granted to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest<sup>2</sup> in their provision of non-TDM-based special access services (“Forbearance Reversal Petition”).<sup>3</sup>

The opening round of comments exposed the usual sharp divide between carriers seeking to avoid regulation and their customers, who literally pay the price for the Commission’s premature de-regulation of special access services. ILECs predictably opposed the Forbearance Reversal Petition,<sup>4</sup> claiming (yet again) that the market for special access services is vigorously competitive while providing (yet again)

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<sup>2</sup> Press Release, FCC, Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law (March 20, 2006); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“AT&T Forbearance Order”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (“Embarq & Frontier Forbearance Order”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008).

<sup>3</sup> Petition of Ad Hoc Telecommunications Users Committee, BT Americas, CBeyond, Computer & Communications Industry Association, Earthlink, Megapath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-based Special Access Services, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012).

<sup>4</sup> See, e.g., Comments of Verizon and Verizon Wireless (filed Apr. 16, 2013) (“Verizon Comments”), Comments of AT&T Inc. (filed Apr. 16, 2013) (“AT&T Comments”), Comments of CenturyLink, Inc. (filed Apr. 16, 2013) (“CenturyLink Comments”), and Comments of Hawaiian Telcom, Inc. (filed Apr. 16, 2013).

no factual support for their claims. On the other hand, competitive providers,<sup>5</sup> for whom special access services are essential business inputs, and state regulators,<sup>6</sup> who are responsible for ensuring just and reasonable rates, terms, and conditions for customers, supported the Forbearance Reversal Petition, describing a special access market that is dominated by the ILECs. Given the lack of competition, these commenters concluded, regulation is necessary to protect customers who depend upon special access services.

As described in greater detail below, the ILECs' factual support for their competitive claims utterly fails to substantiate their position, for several reasons. First, much of the "data" submitted by the ILECs that purports to demonstrate a vigorously competitive special access marketplace consist, once again, of predictions by industry watchers and citations to sales puffery and investment hype from competitive access providers, not objective, empirical data regarding actual marketplace conditions. Worse yet, much of the ILEC information conflates the special access market with the interexchange services market and, as such, can not serve as a basis for analyzing, much less deregulating, the special access market.

Second, the ILEC submissions that do relate to the market for special access services are fundamentally flawed. They lack denominator data, i.e., they supposedly identify the number of competitive access connections but fail to identify the total number of connections, information that is uniquely available to the ILECs themselves. Without such information, the Commission cannot assess whether competitors' facilities are extensive enough to have any impact on the market behavior of the ILECs. The

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<sup>5</sup> See, e.g., Comments of the Midwest Association of Competitive Carriers, Inc. (filed Apr. 16, 2013), Comments of Comptel (filed Apr. 16, 2013), and Comments of Level 3 Communications, LLC (filed Apr. 16, 2013).

<sup>6</sup> See Comments of the New Jersey Rate of Counsel (filed Apr. 16, 2013).

ILEC submissions also combine information for facilities-based competitors with that of competitors that must purchase their access facilities from ILECs. Unlike facilities-based competitors, however, such non-facilities-based market players do not exert downward pricing pressure on the market for access services and, without the very regulatory protections the ILECs can evade thanks to forbearance, will be constrained as to profitability and competitive impact by their ILEC suppliers.

Third, the ILECs cited data regarding CLEC purchases of non-TDM services from them. But those purchases do not shed any light on the state of competition in the special access market. The ILECs provide no information that would allow the Commission to determine whether the non-TDM services to which they refer are last mile special access services, or whether the purchasing CLECs have no options other than their ILEC competitors in the markets at issue.

The ILECs' failure to support their competitive claims with market data stands in stark contrast to the fulsome record already developed in this docket. As discussed at length in the Forbearance Reversal Petition, the Commission's special access forbearance decisions must be revisited because the Commission premised them upon predictions that facilities-based competition would increase after forbearance. Now that those predictions have turned out to be wrong, and the ILECs have once again failed to muster factual support for their claims to the contrary, the Commission must act to protect competition and consumers by reversing its special access forbearance.

## **II. DISCUSSION**

The Forbearance Reversal Petition pointed out competitive conditions in the market for packet-based special access services that compel a reexamination and

reversal of the FCC's grants of forbearance. The ILECs opposing the Petition claim that there is ample competition in the non-TDM special access market but can support those claims with nothing but weak, inaccurate, and irrelevant information. As discussed below, the ILEC's claims and the evidence that supposedly supports them should be given little, if any, weight in the Commission's evaluation of the Forbearance Reversal Petition.

**A. ILEC Data Are Not Reliable Or Probative Of The Market For Access Services**

The ILECs rely on various representations and statistics regarding commercial activity in the market for packet-based access services. But the information they cite is subjective and non-empirical or relates to services other than those at issue.

The ILECs rely heavily, for example, upon citations to industry analysts' and prognosticators' market estimates<sup>7</sup> and the patently self-serving marketing and investment materials of CLECs and cable providers.<sup>8</sup> But these supposedly expert prognostications and marketing materials are designed to boost sales and investment. They do not constitute objective, empirical data upon which a reasonable Commission decision can be based. The ILECs' inability to produce reliable, probative data to support their opposition to the Forbearance Reversal Petition is powerful confirmation that such data simply does not exist because markets simply aren't competitive. Given the dearth of evidence proffered by the ILECs, the Commission must conclude that there is no factual justification for continuing its ill-advised forbearance from regulation of the ILECs' non-TDM special access services.

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<sup>7</sup> See, e.g., Verizon Comments at 8-17 (30 out of 47 citations are to analyst or trade press reports).

<sup>8</sup> Verizon Comments at 10-11, 13; CenturyLink Comments at 36-39.

In addition to its questionable reliability, AT&T's and Verizon's supporting "evidence" includes wholly irrelevant data since it includes not only information regarding the access service market, but also the interexchange and international services market or some combination of all three.<sup>9</sup> The product markets for interexchange and international services are not the same as the market for last mile access services. Nor does the Forbearance Reversal Petition seek to apply the Commission's access charge rules to the interexchange and international services that AT&T and Verizon reference in their comments. The last mile access services that are the subject of the Petition can be an input to those interexchange service offerings (be they voice, private line, or packet-based) but not a substitute for them. To the extent that competitive market conditions may exist for interexchange or international packet-based services such as Ethernet WANs or cloud-based services, those conditions do not make the market for last mile access facilities competitive. Indeed, such competition is in fact dependent for its very existence upon the continued, non-discriminatory availability of leased last mile access, primarily from the ILECs, with reasonable rates, terms, and conditions.

Finally, many of the carriers referenced in Verizon's laundry list of "competitors" do not own any last mile facilities or operate in the access market. Deliberately obfuscating the market in question, Verizon describes these providers as operating in the market for "business Ethernet services," not the access service market. Because many of the services referenced in Verizon's filing are sold by vendors that do not offer

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<sup>9</sup> See, e.g., Verizon Comments at 8-17. As an example, footnote 21 specifically references an IDC report discussing enterprise customers "utilizing Ethernet services for domestic and international WAN networking...." See also AT&T Comments at 6 and 27-31.

separate last mile access services,<sup>10</sup> these services cannot, by definition, demonstrate competition in the special access market.

**B. The Limited ILEC Data That Do Address Last Mile Access Services Are Fundamentally Flawed**

Even in those few instances where ILEC claims relate specifically to the market for last mile services (including some of the mass of marketing materials contained in the Appendix to Verizon's Comments), the data suffer from two shortcomings: (1) quantities of competitor-owned last mile connections to commercial locations are presented without data regarding the size of the market as a whole; and (2) the data fail to distinguish between last mile connections sold as components of competitors' interexchange service offerings (most frequently over leased ILEC connections) and CLEC-owned last mile access facilities.

The lack of data regarding total market size vastly overstates the significance of the CLECs' share of that market. The 17,948 buildings that Verizon claims are connected directly by tw telecom fiber, for example, may seem considerable on their own, as does tw telecom's claim to have "Ethernet ubiquity across 75 markets."<sup>11</sup> That nose count is decidedly unimpressive, however, when viewed in the context of the approximately *five million* commercial buildings in the United States.<sup>12</sup> Stripped of extraneous data and placed in its market context, therefore, Verizon's strongest

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<sup>10</sup> Verizon Comments at 11. As discussed in footnote 13 *infra*, several of the providers identified in Verizon's filings as competitors responded to the FCC's voluntary special access data request indicating that they do not own any last mile access facilities.

<sup>11</sup> Verizon Comments at 10.

<sup>12</sup> Department of Energy data collected in 2003 revealed 4.9 million commercial buildings and 350,000 industrial facilities in the U.S. Energy Star, *Fast Facts on Energy Use*, available at [http://www.energystar.gov/ia/business/challenge/learn\\_more/FastFacts.pdf](http://www.energystar.gov/ia/business/challenge/learn_more/FastFacts.pdf).

evidence of competition in the market for last mile packet-based access services is that there is a facilities-based competitor that can reach less than one percent of commercial locations nationwide and must use leased incumbent carrier last mile access to provide its customers with “Ethernet ubiquity across 75 markets,” hardly a persuasive case that the market is competitive.

Moreover, facilities-based competition, or the lack thereof, is critical to a robustly competitive special access market. Resold ILEC access facilities may provide competitive pressure on downstream markets by allowing non-facilities-based competitors to compete and by extending the geographic reach of competitors with limited last mile facilities. But resold ILEC access facilities have no such effect in the market for packet-based access facilities themselves. To this point, Verizon’s filing includes as access providers carriers that have already informed the Commission that they own no facilities, as part of their responses to the 2010-2011 voluntary data request that is part of the record in the instant docket,<sup>13</sup> further undermining any confidence the Commission can reasonably have in the “evidence” submitted by Verizon’s in support of continued forbearance.

In a final ironic twist, the ILECs tout the Ethernet Over Copper (“EoC”) services offered by their competitors as an example of the competitive provision of last mile services which justifies continued forbearance. The ILECs also make the point that their competitors can provide EoC economically because they can purchase the copper

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<sup>13</sup> Due to the highly confidential nature of the data submitted in response to the FCC’s data request, and because the confidential data is available for the Commission to consult directly, Ad Hoc has not identified those carriers’ names or numbers. For the Commission’s convenience, Ad Hoc can provide via confidential filing a table listing those carriers that responded to the first voluntary data request by pointing out their lack of facilities.

loops (i.e., the last mile facilities) at TELRIC rates.<sup>14</sup> What the ILECs do not point out is that, while emphasizing the competitive benefits of EoC, they have also been urging the FCC to deregulate all IP services, including EoC, thus relieving them of the obligation to provide it to the very competitors who depend upon it in order to deliver the competitive services that supposedly justify forbearance.<sup>15</sup> Once these services are deregulated, the ILECs will no longer be obligated to unbundle their networks and offer their copper loops to competitors at rates that allow the competitors to provide competitively-priced last mile services. And the much touted competition will simply disappear. In a nutshell, EoC demonstrates the hazards inherent in relying on non-facilities-based competition as a basis for deregulating the ILECs.

**C. ILEC Data Regarding Carrier Purchases Of Unspecified Non-TDM Services Do Not Prove That The Marketplace is Competitive**

In another attempt to bolster its contention that the special access market is in fact competitive, Verizon reports (with no documentation) that:

In the time since it obtained forbearance, Verizon has entered into approximately 3,300 private carriage contracts with unaffiliated carriers for non-TDM based services, valued at more than \$3.7 billion over their lifetime. This includes contracts with five of the petitioners—tw telecom, Sprint, MegaPath, EarthLink, and Cbeyond. These carriers voluntarily negotiated these contracts, and bargained for the terms and conditions they contain.

Verizon Comments at 6-7. Verizon provides no information regarding the nature and

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<sup>14</sup> CenturyLink Comments at 48-51.

<sup>15</sup> See Public Notice, *Pleading Cycle Commenced on AT&T and NTCA Petitions*, 27 FCC Rcd 15766 (2012). In its Petition, AT&T sought relief from the requirement that “In the ‘hybrid loop’ context, where an ILEC retains copper in distribution facilities but upgrades to fiber-optic technology in feeder facilities, current Commission rules require ILECs either to maintain access to the otherwise unused copper infrastructure in the feeder or to provide a non-packetized transmission path between the central office and the customer’s premises.” AT&T Petition at 19.

number of services, circuits, or customers covered by these contracts, which may be no more than form orders for single circuits. These contracts could be for last mile access services or, consistent with the data provided elsewhere in its comments, may include interexchange services. Absent more information, Verizon's statement has no probative value and the Commission is free to make the adverse inference that additional detail would have undermined Verizon's argument.

Verizon may be suggesting that, since unaffiliated carriers opted to purchase these services from Verizon and negotiated their terms and conditions, the market for such services must be competitive. However, the fact that unaffiliated carriers purchased service from Verizon provides no insight into the competitive conditions of the access market. Another (and more likely) reason for such purchases is that CLECs need non-TDM based access services (if the contracts are even for access services) at specific geographic locations and Verizon was the only carrier with the facilities necessary to provide the service. Without considerably more information regarding these transactions, the Commission cannot rely on the mere purchase of service from an ILEC as evidence of a competitive market and the lack of ILEC market power.

**D. Sufficient Evidence Already Exists In The Record of This Docket For The FCC To Reverse Its Grant Of Forbearance**

Perhaps the strongest evidence in support of the Forbearance Reversal Petition is the ILECs' failure to even attempt a rebuttal of the competitive evidence that already exists in the record for this docket and that accompanied the Petition. Instead, as discussed above, the ILECs proffered confused and misleading data that add nothing useful to the record in terms of either actual or potential competition.

At the time of the initial forbearance grants, the ILECs characterized packet-

based services as a technology so new and different from existing transmission services that it could magically transcend the entry barriers and other market impediments that the Commission and industry observers have long acknowledged to exist in the market for last mile services. Time has passed, packet-based services are becoming as commonplace as traditional TDM-based services, and the magic pixie dust has worn off. Customers, carriers, and industry observers now recognize that last mile packet-based services are subject to the same brute realities of economics and the physical world as their predecessor services. Regardless of the electronics at the end of a loop, or the transmission protocol used by the electronics connected to the loop, the defining characteristic of last mile access services remains an expensive facility that connects a customer-premises to the network, whether that connection is fiber or copper, analog or digital, packet or TDM.<sup>16</sup>

In their comments, the ILECs have failed to address the fact that the fundamental premise for the Commission's grant of forbearance was flawed. Specifically, the FCC's prediction that facilities-based competition would develop for last mile access services in a manner that would constrain ILEC behavior was nothing more than that—a prediction. Seven years have passed since the first forbearance petition took effect and competitors have made every effort to build out their networks aggressively, yet only noise-level changes in the portion of the overall market controlled by facilities-based (rather than resale) competitors has occurred. As the Forbearance Reversal Petition demonstrated, ILECs retain an extremely high share of the last mile facilities that are

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<sup>16</sup> AT&T's claim that "[t]here are no 'incumbent' Ethernet providers. Rather, all providers have developed and deployed these services from scratch" (AT&T Comments at 6) is patently wrong. ILECs make use of the same wires, poles, trenches, building access, truck rolls, and any other incumbency advantages in the provisioning of Ethernet services (requiring primarily a change in electronics) as they do in the market for TDM-based special access services.

necessary to provide both TDM-based and non-TDM-based special access services.<sup>17</sup>

Verizon itself provides a stark reminder of this sobering marketplace fact. In its comments, Verizon identifies the “top eight” Ethernet providers and points out that five of them are CLECs.<sup>18</sup> But the customer locations served by those very CLECs were included in the calculations submitted as Appendix 2 to the Forbearance Reversal Petition. Even with those locations included, the ILECs’ share of last mile connections is “extremely high.”<sup>19</sup> Thus, even the last mile “competitors” highlighted by Verizon must depend upon the ILECs for last mile facilities.

### **III. CONCLUSION**

The record developed in response to the Forbearance Reversal Petition confirms what the overall record in this docket has indicated consistently since it was opened: the ILECs continue to dominate the market for last mile special access facilities, be they TDM or non-TDM. The Commission should therefore reverse its forbearance decisions for non-TDM special access and protect the consumers of these services with regulations that ensure just and reasonable rates, terms, and conditions.

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<sup>17</sup> Forbearance Reversal Petition at 46.

<sup>18</sup> Verizon Comments at 9-11.

<sup>19</sup> Forbearance Reversal Petition at 46 and Attachment 2, Declaration of Susan M. Gately. The ILECs’ and CLECs’ exact shares are highly confidential and appear only in the non-redacted Forbearance Reversal Petition.

Respectfully submitted,

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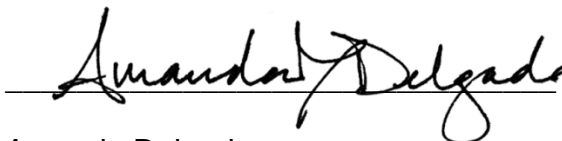
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### **Certificate of Service**

I, Amanda Delgado, hereby certify that true and correct copies of the preceding Reply Comments of the Ad Hoc Telecommunications Users Committee were filed this 31<sup>st</sup> day of May, 2013, via the FCC's ECFS system.

A handwritten signature in black ink, reading "Amanda Delgado", is written over a horizontal line.

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